90-184

Supreme Court, U.S.
FILED
APR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

in the

SUPREME COURT OF THE UNITED STATES

October Term 1990

Harold G. Royce

Petitioner,

vs.

David W. Peyton, Acting Region Administrator, Region X; Vincent J. Hearing, Deputy Assistant Secretary; William A. Medina, Assistant Secretary for Administration; George Roybal, Regional Administrator for Administration, Region X; Peter Carragher, Assistant Regional Administrator for Administration, Region X; Charles Jones, Director of Management, Budget & Information, Region X; Department of Housing and Urban Development,

Respondents.

PETITION FOR WRITS OF MANDAMUS

Either directly to Secretaries of HUD & HHS, or to the United States Court of Appeals for the ninth circuit to United States District District Court for Western district of Washington State.

PETITION FOR WRITS OF MANDAMUS

H.G. Royce (Pro Se)
P.O.Box 578
Woodinville, WA 98072
(206 - 823 - 4167)

QUESTIONS PRESENTED

A. Does heavy case loads or fact a suit involves federal agencies & their employees excuse the justice system its lax performance in doing its chores & its denial of Constitutional rights, benefit of laws, procedures, policies, & rules to one of the litigants?

B. Is a citizen entitled to recover from lost property & rights guaranteed by our Constitution when those losses were inflicted by active conspiracy of some federal employees under color of their offices & passive conspiracy from Justices not doing their jobs; all employed in jobs which requires taking a prerequisite oath to support & defend this same Constitution they voided on purpose of these losses & damage.

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AND, OR
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Harold G. Royce,
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David W. Peyton, Acting Region Administrator, Region X; Vincent J. Hearing, Deputy Assistant Secretary; William A. Medina, Assistant Secretary for Administration; George Roybal, Regional Administrator for Administration, Region X; Peter Carragher, Assistant Regional Administrator for Administration, Region X; Charles Jones, Director of Management, Budget & Information, Region X; Department of Housing and Urban Development,
Respondents.

PETITION OR WRIT OF MANDAMUS to the United States Court of Appeals for the Federal Circuit, (and/or) Dept. of HUD & HHS.

To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court

of the United States:

Petitioner, (H.G. Royce) prays for Issue of writ of Mandamus to the Depts. of HUD (Sec. Mr. Kemp), HHS (Sec. Dr. Sullivan), & his commissioner of Social Security Admin (Ms. King), (and/or) the Court of Appeals demanding Mr. Peyton & his coconspirators in HUD & SSA cease & desist obstructing justice and their victims ability to earn a living. Stop engaging in slander & illegal reprisals causing damage to Petitioner & witnesses Dr. Allard & Mr. Gipson for giving testimony in this case. & either direct HUD to reinstate Petitioner **Or**

(A) Mandate the denied full, fair, De Novo trial now be given this cause, order the Courts to allow full presentation of all material & relevant evidence giving all full consideration. And,

(B) As only one side of the litiga-

tion was ever allowed full presentation & rebuttal rights, highly biased tribunals conducted improper proceedings, lacking of Due Process. Therefore the clearly erroneous fact findings, dismissal of proper defendants, & blind affirmations of agencies illegal decisions need to be set aside.

I.

OPINION BELOW

In Appendix '$A_{1, 2, \& 3}$' are the two courts three "opinion memorandums" entered by the United States Court of Appeals for the Ninth Circuit on February 2, 1990, and November 20 1989 and the United States District Court western district of Washington in July 1988.

In the face of complaints of corruption, manufactured evidence, and conspiracy Court provided no opportuni-

ty[1] to qualify or consider (Defendants) agencies restriction of evidence & corrupt conclusions! Then considering only limited facts, irrelevant and immaterial issues, the Court assessed Petitioners' answers to some questions as "egregious inconsistencies in his testimony"! Perhaps Petitioners' reticence to declare questionable formal education, & expound from memory details of a corruption issue he was not qualified to prosecute, may have been confusing. But the Court had a duty to declare its confusion, then provide opportunities to fill in any facts it missed

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[1] *"Whether proceeding be criminal or administrative action growing out of discharge of one of its employees, ultimate objective of government MUST be not that the government shall win case but that justice shall be done." Barnes v. Chatterton 515 F.2d 916.*

(probably due to the restrictions placed on the evidence Petitioner could present). Instead Court parroted the agencies, and declared itself "fully advised" because it held a "hearing" (truncated due to time constraints, allowing only 4 of 54 witnesses), "reviewed the file" (which was short about a file drawer full of documents), "& administrative record" (proven faulty & lacking) - ref. page 1, Appendix A_3.

II

JURISDICTION

Is under Article III sections 1 & 2 of the Constitution; "..Judicial Power of the United States, shall be vested in one supreme Court,....", "..judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution", "...and In all Cases affecting..,public Ministers.... Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction,." USC 28 1651 (writs),

1254(Petition), 2241(power to grant), &

Rules 12, 13, 14, 17, 20, 29, 33, & 44.

III

CONSTITUTIONAL PROVISIONS INVOKED

Article III, ..Judicial Power..."

First Amendment "...abridging the freedom of speech,..and to petition the Government for a redress of grievances.",

Fifth Amendment "...nor shall any person .....be deprived of life, liberty, or property, without due process of law;",

Seventh Amendment "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,",

Eighth Amendment "nor cruel and unusual punishments inflicted.", and

Fourteenth Amendment ".. equal protection of the laws."

IV

STATUTES INVOLVED

U.S.C. 42 1985, U.S.C. titles 5 and 28. Code of Federal Regulations Subpart B. Title 5 752.202, 772.308, 4303, 7701(c)(1),(A) & (B), 7701(c)(1)(C)(2)(A),(B),& (C), FPM Supp 752-1, s3-2b(3),(3)& (1), CSC regs Sec 752,202(b) & (f); 752.1(a); HUD regs 752.2,16.a.(2),(3),&(6); b.(2)(c), & (i); 19.a.(1) & b.(2); 20.a., b.(1)(a), (b), & (c).

V

STATEMENT OF FACTS

(GENESIS OF THE CAUSE)

Petitioner went to work for HUD in 1974. Almost immediately he was faced with discoveries of illegal activities which he reported to his supervisor

resulting in escalating threats, pressures, & reprisals from the supervisor to keep him quiet & go along.

(1ST AMENDMENT RIGHTS)

After writing his senators[2] of wrongs & planned misuse of millions in public funds, HUD supervisors were finished with threats & started generating conditions & contriving events to build a case for Petitioners' removal (Accomplished in violation of agencies own rules and Federal Law which has been reason enough for past immediate reversal of such actions and reinstatement).

(ABROGATION OF 5TH, 8TH, & 14TH AMENDMENT RIGHTS)

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[2] *Ref. many supporting statues such as 5 7211 "the right of employee... to petition Congress... may not be interfered with or denied"*

HUD violated[3] its own regulations 752. 1 & 2, as well as Code of Federal Regulations 752.104 & .202 by:

1) Not providing Petitioner with all the evidence considered[4] in making the decision to remove him. For example, the Medina memo suggesting how to go about setting up petitioners removal was first made known to him after his removal; just minutes before the CSC hearing.

2) The deciding official (Roybal) was not a higher[5] level than Medina who proposed the removal.

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[3] *"adverse personnel action carried out in substantial violation on procedural regulations, it is a void action" Gratehouse v. U.S. 512 F.2d 1104 AND "Civil service employee deprived of procedural right by Civil Service Commission (now Merit Systems Protection Board) on removal hearing MUST BE REGARDED AS NOT YET LAWFULLY REMOVED AND IS ENTITLED TO HIS PAY OTHERWISE DUE." Hanifan v. U.S. 354 F.2d 358*

[4] *Appendix C_2 pg2, 752.1(a)(3)(page 13).*

[5] *Appendix C_2 pg1 (752.2, 16 a.(6))*

3) Petitioner was denied official time[6] to answer charges; plus supervisor had him so loaded with extra nonsense work, he was putting in 10 & sometimes 20 unpaid extra hrs a week just trying to keep current.

4) Petitioner was not removed for the good of the service[7], but for illegal reprisal; which has proved a detriment to the service in several ways; not the least of which has been a 9+ yr delay of some systems Petitioner was installing at the time of removal.

5) Petitioners' 200 plus page answer was submitted on June 20, 1978; Mr. Roybal (who was to consider it in making his

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[6] *Appendix C_2 (752.2, 16 a.(4))*

[7] *Appendix C_2 pg 2 (752.1 (a)(1).)..* ***law forbids...*** *adverse action unless it improves agencies efficiency & Appendix C_3 FPM 752-1 sec S3-2b(3)&(1)*

decision)[8] was on travel status & did not return until June 29th. Petitioner received his decision[9] on that day, along with an illegal denial of his right to make an oral presentation[10] because it was verbal & had not been documented. Not a single question or charge made was addressed in the decision; nor (as required by law) was there ever any investigation of the discrimination claims made several places in that submission. As none of the issues in the answer were addressed or acted

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[8] *Appendix C, CFR 752.2, 19,a.(1) & 20a.*

[9] *Appendix A*

[10] *oral was denied by disclaiming the request & giving decision, negating presentation for consideration in making decision. By HUD reg. 752.2, 20.b(1) decision had to be made on day of Roybals return & there was no time for the oral. So it was made to seem employee had not ask to also present vocally*

on, it is obvious (at best) someone like a secretary might have skimmed the pages; but no one "With authority to make a decision" ever completely read (let alone considered) this "employees answer"[11].

Following the "railroading" by the Defendants, an appeal was filed with the local Civil Service Office. Whose hearings officer must of been in communications with HUD defendants, otherwise the suppression of evidence & witnesses would not have occurred! Even statements of certain issues were kept out of the record (see Appendix D). Petitioner was denied protection of the standards and procedures at agencies level. Was never allowed to present a full defense of the

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[11] *Appendix C_2 752.2, 19(a)(4)pg 19*

charges in certain areas, or to make pertinent points[12]. Points like why some assignments were deliberately not doable. Or, with over 13 years service (4 military, 9 civil, showing a history of promotions & awards for doing good work), only this one group of close knit HUD supervisors had spawned the only com plaints made of his work; Or, why the harsh action of a removal for not being "timely" in accomplishing a confusing task outside the job description. Especially when the policy for far grater performance voids, in legitimate chores, was to down grade or transfer

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[12]"*Employee was denied his right to a full & fair trial... when he was prohibited from presenting evidence of prohibited personnel practices*" *Frampton v. Dept of Interior F.2d 1486.*

those of much less tenure and provide training for employees of Petitioners' tenure.

The agencies hearings officer (Strand) allowed only enough Petitioners evidence to give the impression of a fair hearing. By going "off & on the record" followed by inaccurate summaries for the time, the true nature of the hearing was concealed.

In order to affirm agencies action Strand also wound up breaking laws & stifling evidence. He closed the record illegally[13] which denied Petitioner legal rights, & prevented a full, fair hearing of the issues[12]. AND as shown in

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[13] *Appendix D1 (quotes from verbatim & affidavit) plus Appendix C_3 (CFR 772.308)*

the cites, a just cause to immediately reverse removal & reinstate employee[3].

Having gone though this same process over denial of an in-grade promotion (based on these same phony charges, from these same Defendants) and having it completely reversed by ARB of national CSC, Petitioner appealed to them. Unfortunately ARB did not accept the appeal as they disagreed with local CSC as to what was timely.

CSC (MSPB) stated the only recourse left was the court system (admission of exhaustion of available administrative procedures). An immediate complaint (of torts & statute violations caused by specific persons, office holders, and agencies, asking for a jury) was filed in Federal District Court in 1979. NOT A REQUEST FOR REVIEW, but a trial of torts

and agencies' denial of legally protected rights (restriction of pertinent evidence was complained of at CSC hearing summation. And, surprisingly is still in that record)[13].

Attempts to show agencies improper actions were blocked or ignored at the District Court level. Perhaps due to work loads, the nature of the suit, politics, laziness, or just incompetent Court members. Whatever the reason, courts distorting bias would not allow recognition of obvious wrongs (such as the reiterated violations of CFRs & law noted herein).

Statutes & cites of law are replete in stressing the courts responsibility to defend Constitutional rights; but when courts ignore such direction what becomes of the law?

District Court claims NOT to have

treated this case as if it were filed under Title 5. But, all decisions were made as if it were! Even to the exclusion of other law. Example, the reason given for denying the requested jury trial in favor of a "hybrid review" is based on the Campbell cite & n.1 of Revis v. Laird cite[14]. Reading the cites shows the deciding force in these cases was Title 5 law! Also, the actual note 1 (Appendix B1) seems to state the exact opposite of the courts interpretation[14]. Even if the Court had read it correctly, it again negates Courts claims there was no such consideration of title 5, as the cite clearly states it is based on Title 5 law. Also, false in this

.....

[14] *Appendix B1 pg 1 & 2 judge misread cites ref. & Appendix A3 page 5.*

Petitioners' case, cite assumes a full & fair hearing was provided at the admin. level & employees had a full opportunity to defend themselves.

(DENIAL OF 7TH AMENDMENT RIGHTS)

After a decade of motions, counter motions, (even a dismissal for failure to prosecute while a motion was before the Court), Plaintiffs' unsuccessful attempt to amend (Defenses' successful exo facto amendment of) complaint, District Court refused the requested De Novo Jury trial. But, offered to provide a De Novo decision on a review of the record (which Court would allow supplemented if record was proven faulty --- -- **decision again based on cites from a Title 5 "APA" cause**). Plaintiff agreed, so long as the courts' review action was not in lieu of jury trial.

As it worked out, not only was the review incomplete, but was indeed in lieu of any kind of trial on the complaint filed. The promised supplementation and De Novo decision was also reneged on!

The record was proven faulty to the Courts' satisfaction; however, the Court allowed only 4 of 54 witnesses and less than a dozen of over a hundred documents for supplementation. The Court then disqualified even that meager allowance. In obvious contrast, the Court accepted all Defenses' presentations; including witnesses - even more unqualified (based on the same criteria[15] used to disqualify Petitioners' witnesses). The Rothstein Court even considered (over objections) improper, irrelevant claims of a misunderstood condition[16] which occurred about 9 years after the issues

it was supposed to be weighing.

At this point Petitioner has been consistently denied rights to:

1) have equal application of law, criterion, consideration, in his litigation;

2) present relevant & material evidence in his behalf & proof of his complaint;

3) a Jury trial; even questioning the

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[15] *Appendix A_3. Applying Courts' criteria (not enough time with Petitioner & having problems with HUD) shows all Defenses' witnesses less qualified then Petitioners'. Supervisor Jones spent the most work time with Petitioner Of any defenses witness, that did not exceed 4hrs a week - some weeks 0 hrs! He was incompetent & hated Petitioner so minimized exposure. & like most had his trouble with HUD. In contrast, Mr. Hogan (disqualified by application of the criteria), spent several 60hr weeks working closely with Petitioner, & while he did have problems with HUD none were as serious as those of most of the Defenses' witnesses.*

[16] *Predisposed based on HUD action. Proof was by interpretation! i.e., "no" to a question like "were you fired in the last 5 yrs", 6+ yrs later, was accepted; tribunal ignored time limit. Court would accept no refuting evidence, rebuttal, or explanation!*

perpetrators of this outrage under oath has never been allowed.

In the face of these complaints, and proof the record Court reviewed was faulty, Court (without considering full facts & evidence in conflict) proclaimed Petitioner was given a full & fair hearing at the agency level (without addressing how this conclusion was possible).

The Court convinced by Title 5 cites only a review was proper, simply parroted agencies proclamations so original "Kangaroo court" decisions (including denying considerations of corruption, conspiracy, and malicious animus on the "defendants" -- agencies part) was not disturbed.

However, after all the Courts' preferential treatment of the defend-

ants, at the time Court concluded its "review" it only came up with the removal being supported by **"substantial"** evidence when a **"preponderance"** is required to affirm[17] agencies removal action! yet Court instead of reversing agencies removal, erroneously "affirmed" the action & dismissed this case!

An immediate appeal to the Court of Appeals was made noting the deprivations & errors. This Court again parroted lower judiciary with little (if any) individual cogitation. It 1) denied Court & Defense unofficially amended complaint to include a Title 5 cause through an understanding between them, &

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[17] *Appendix C1 7701 (c)(1)(A) &(B)*

2) admitted suit was not brought under Title 5 law (Title 5 precedence prohibits replacing agency opinion with that of the courts' and restricts the courts involvement to only a review of procedures). Yet (3) under the laws suit was filed, there is no excuse for Court to restrict itself to a review! In clear contrast, a full, fair, De Novo trial is required as case was filed! Neither Court rationalized these conflicting facts!

Contrary to its own declaration (absence of Administrative Procedure Act considerations, title 5 law), Appellant Court accepted Defenses' two irrelevant case cites[18] & used them in its decision (APPENDIX A_2).

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[18] *Appendix E_1 (Court ignored Appellant to base decisions on erroneous authorities)*

Appellate Court made no effort to consider anything Appellant presented nor did it address the issues placed before it, (WOULD NOT see obvious procedure errors & violations of law from agencies levels to District Court) a request for a retrial was made, but the court refused. (Appendix A_1).

Which brings this citizens appeal to this Court for justice.

VI

REASONS FOR GRANTING WRIT

A. This case provides the court an opportunity to reinforce the administrations' and legislatures' desires as expressed in laws subsequent to Petitioners' damage, which give more pointed protection to whistle blowers & Federal

employees Constitutional rights. Ref. Title 5 laws passed in the last few years & creation of offices & procedures for whistle blowers not available to this Petitioner in his time.

B. In this case the Court has an opportunity to show maintenance of expected judicial standards. A hands off attitude at the Supreme Court level is sure to signal this courts permission for Tribunals to conduct their business in ways repugnant to the Constitution of the United States. Or If it will ease any pressure from a non-case issue, judicial quality may be diminished (as in this case) beyond the point of direct conflict with several Constitutional edicts.

C. As recognized by many, graft & other illegal activities along with laziness, & plain stupidity in our

governmental work arena has given the federal worker an uncomplimentary image & has cost all citizens more than just money, services, and good government. It is destroying faith, trust, support, the very structure needed for a governments' survival. The only hope of stemming these destructive processes seems to rest with the occasional conscientious employee finding courage to "blow the whistle". Returning retribution & reprisals as rewards for these acts of courage, will destroy this lone corrective element that has shown it can do what all the established regulating departments to date have not.

For the same reasons Petitioner in this case has not gone public with HUD GRAFT, the Typical aim of whistle blowers is to improve & protect, not injure or degrade the government. Though few

can afford to lose their jobs, be "black balled", etc. there are some that do.

A show of strong protection for "Whistle Blowers" in prior years could well have canceled the unscrupulous few acts that have manifested in the rape of Savings & Loan Cos, the NASA shuttle explosion, Airplane crashes, & other "hood winks" costing much more than just the dollar assessments placed on them.

By taking the wraps off this case (and allowing the stifled evidence, the activation of denied laws, procedures, regulations, & rules), this Court will show the whole country wants an effective governmental conscience; & will not condone its destruction through, intimidation, & incompetent processing.

VII

CONCLUSION

The U.S. attorneys (through their office & legal expertise) have blocked this litigation, good government, & Justice for over a decade! This cause was never afforded a full & fair trial of all the issues, it has not even been possible to have the defendants questioned under oath! Though some suppressed evidence still exists that Petitioner was victimized for keeping his oath of office & doing his duty, the passage of time has lost for ever documents & testimony due to expunged files and deaths. BUT:

1) Petition should be granted for reasons of justice, the good of our Government, and those citizens depending

on governmental sections doing the work their taxes pay for.

2) If the full prayer is not deemed possible, then as a very minimum, Please, a mandate to OMB, HHS, & HUD agencies, ordering Mr. Peyton & his coconspirators to reverse the reprisals they have taken against witnesses for giving testimony in this case; and an order of reinstatement for the Petitioner based on the laws noted herein which show removals like this are illegal[12 & 3], and used to reverse other removals of this nature.

Respectfully submitted,

H.G. Royce (pro se)
P.O. Box 578
Woodinville, WA 98072

NOT FOR PUBLICATION

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FOR THE NINTH CIRCUIT

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v.
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Defendants-Appellees.

No.88-4244 D.C.No. CV-79-1016-BJR
O R D E R Filed 2/2/1990

Before: NORRIS, THOMPSON, and O'SCANNLAIN, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of

the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

NOT FOR PUBLICATION

IN

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Plaintiff-Appellant,
v.
David W. Peyton, Acting Region Administrator, Region X; Vincent J. Hearing, Deputy Assistant Secretary; William A. Medina, Assistant Secretary for Administration; George Roybal, Regional Administrator for Administration, Region X; Peter Carragher, Assistant Regional Administrator for Administration, Region X; Charles Jones, Director of Management, Budget & Information, Region X; Department of Housing and Urban Development,
Defendants-Appellees.

No.88-4244 D.C. No. CV-79-1016-BJR

M E M O R A N D U M* Filed 11/20/89
Appealed from the United States District Court for the Western District of Washington Barbara J. Rothstein, District Judge, Presiding argued and Submitted

*This disposition is not appropriate for publication & may not be cited to or by the courts of this circuit except as provided by ninth circuit Rule 36-3

October 4, 1989 San Francisco, California. Before:

NORRIS, THOMPSON, O'SCANNLAIN, Circuit Judges. Harold G. Royce appeals the court's judgment entered in his civil rights action brought against defendants Charles Jones, & George Roybal, who were Royce's superiors when he was employed as a computer specialist at the Department of Housing & Urban Development ("HUD"). In his complaint, Royce claimed that defendants terminated his employment in violation of 42 U.S.C. 1985(1) & his rights under the First & Fifth Amendments to the United States Constitution.

The Merit Systems Protection Board decided, after a hearing, that Royce's termination had been justified. Royce then brought this action in district court, seeking damages against defend-

ants, who allegedly played a role in his termination.

The district court agreed with the Board's finding that Royce's termination and been justified. The district court found (1)that Royce had had "a full opportunity" to present his "substantial evidence," and that (2) Royce had failed "to complete his assignments in a timely and correct way." Decision at 3 (Aug. 12 1988). In particular, the district court found that he could have completed his handbook assignment, but that he failed to do so.

We affirm the judgment of the district court because its finding that Royce's termination was justified is not clearly erroneous. See Fed. R. Civ. P. 52(a). The record is replete with instances in which Royce failed

to undertake his assignments in a responsible manner. He submitted incomplete work that did not conform to the requirements of the task and that was inevitably late.

The district court did not find the witnesses who testified on Royce's behalf to be credible because they did not work with him and had their own personal grievances against HUD. Decision at 4. Moreover, the district court found Royce's testimony to be marked by "egregious inconsistencies" and to be undermined by the fact that he had submitted a false employment record when applying for a federal position. Id.

In sum, the district court rejected Royce's claim that he was terminated as a result of a conspiracy and in violation of his civil rights, finding

that he failed to prove that his termination was motivated by any improper purpose.

Royce complains that the district court based its findings of fact in part on the administrative record, rather than on a trial de novo. The district court acted within its discretion in relying upon the administrative record, as well as the testimony of live witnesses, which the court permitted Royce to call. See Revis v. Laird, 627 F.2d 982, 984(9th Cir. 1980);Bowers v. Campbell, 505 F.2d 1155,1161 (9th Cir. 1974). Royce provides no authority for his claim that the district court recognized de facto a cause of action under the Administrative Procedures Act ("APA"); his claim alleges only violations of 42 U.S.C. 1985 and of his rights

under the First & Fifth Amendments. We find his de facto APA claim to be without merit. Royce's First & Fifth Amendment claims are also without merit. They are barred by the existence of administrative procedures to address his claim of improper dismissal. Johnston v. Horne, 875 F.2d 1424 (9th Cir. 1989) ("the existence of statutory and administrative procedures for addressing complaints of improper personnel action bars [plaintiff's] claim."; see Karamanos v. Egger, 882 F.2d 447, 452 (9th Cir. 1989). Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

HAROLD G. ROYCE, Plaintiff, v. DAVID W.PEYTON, Acting Regional Administrator Region X, et al., Defendants.	No. C79-1016R FINDINGS OF FACT AND CONCLUSIONS entered docket Aug. 12, 1988

THIS MATTER comes before the court for a decision on the merits of this case. Having conducted a hearing, having carefully reviewed the file and the administrative record, and being fully advised, the court finds and rules as follows:

In July of 1978, plaintiff Harold G. Royce was terminated from his position as a computer specialist with the Department of Housing and Urban Development (HUD). This case involves the

legality of that termination.

Before turning to the merits, it is essential to clarify the nature of plaintiff's case because there has been much confusion on that point. Plaintiff insists that his case involves two causes of action: (1) an action against HUD for judicial review of the administrative process by which HUD removed plaintiff from his job; and (2) a constitutional tort action against three individual supervisors at HUD who allegedly discriminated against plaintiff in violation of 42 U.S.C. 1985.

The court cannot agree. The only causes of action alleged in plaintiff's complaint are for violation of 42 U.S.C. 1985, The First Amendment and the Fifth Amendment. Plaintiff did not sue for review of an administra-

tive action under the administrative Procedure Act ("APA"), 5 U.S.C. 700 et seq. While plaintiff did name HUD as a defendant originally, the court long ago dismissed HUD from the case on the grounds that it was not a proper defendant. See Order On Defendants' Motion to Dismiss issued on September 2, 1980.[1] The court also denied plaintiff's more recent motion to amend his complaint to add the United States of America as a defendant on the grounds of immunity

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[1]The Order stated as follows: Defendants point out that HUD is not itself a proper defendant in this case. It is well established that federal agencies are not subject to suit eo nomine unless such suit is explicitly authorized by Congress. see, e.g., Shelton v. United States Customs Service, 565 F.2d 1140, 1141 (9th Cir. 1977) (affirming Sharp J.) No such congressional authorization exists in this case. The Department of Housing and Urban Development should accordingly be dismissed as defendant herein."

from suit. See Order Denying Plaintiff's Motion for Trial De Novo and to Amend Complaint and Defendants' Motion for Reconsideration of Certification of Immunity Question issued on April 13, 1987. Plaintiff argues that the court de facto recognized a cause of action under APA by limiting its review to the administrative record with supplementation because this standard of review is only appropriate in APA suits. Plaintiff is incorrect. In ruling on the applicable standard, the court was relying on Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974), and Revis v. Laird, 627 F.2d 982 (9th Cir. 1980). Those cases hold that a federal employee who brings a civil rights claim under 42 U.S.C. 1981 is not entitled to a de novo trial if he or she received a full and fair hearing at the administrative level. Instead,

the cases set forth a "hybrid" standard of review "with a de novo decision by the district court based primarily on the administrative record (if it is determined to be fair and adequate) with provision for the admission of additional evidence." Bowers, supra at 984. A footnote in Revis, id. at 983 n.1, makes it clear that the same standard of review applies to federal employees' causes of action brought under 42 U.S.C. 1985 as well as the First and Fifth Amendments.

Turning to the merits, the court has carefully reviewed the administrative record in this case. The court also allowed plaintiff to supplement the record by introducing the testimony of three witnesses. Based on the court's review of the record compiled at the administrative level together with the

evidence submitted at the supplementary hearing, the court is satisfied that plaintiff received a full opportunity to present his grievances. and that the administrative decision upholding his termination was supported by substantial evidence.

At his administrative hearing, plaintiff had a fair and adequate opportunity to present evidence on his behalf as well as to cross-examine witnesses against him. Substantial evidence was adduced at the hearing to support the administrative law judges's conclusion that plaintiff failed to complete his assignments in a timely and correct way. In particular, there was the testimony of Charles Taylor, plaintiff's supervisor, who stated that plaintiff had in his possession handbooks from other regions similar to the one which he had

been assigned to complete, and that plaintiff could have adapted those handbooks for use in his own region by making relatively minor changes.

The court also allowed plaintiff to supplement the administrative record with the testimony of three witnesses; Patrick Gipson, Frank Hogan and plaintiff himself. having heard these witnesses, the court remains convinced that the administrative decision upholding plaintiff's termination was correct. The court did not find any of plaintiff's witnesses credible. neither Gipson nor Hogan worked closely with plaintiff on a day-to-day basis. Both evidenced antipathy toward HUD because of their own employment problems.

As for plaintiff, in addition to egregious inconsistencies in his testimony, plaintiff's credibility was seri-

ously undermined by the fact that he misrepresented his college background and that in 1986, the Merit Systems Protection Board found that plaintiff intentionally falsified his employment record in an application for a federal position, and barred him from federal employment until after December 26, 1988.

For the above-stated reasons, the court concludes that plaintiff's termination was justified, that he did not prove his causes of action against defendants, and that his case should be dismissed.

Dated at Seattle, Washington this 12th day of August, 1988.

BARBARA J. ROTHSTEIN

CHIEF UNITED STATES DISTRICT JUDGE

MEMORANDUM dated June 29, 1978

To: Harold G. Royce Computer Special

ist Seattle Regional Office

From: George J. Roybal, Seattle Regional Office, 10S

Subject: Decision to Remove

I have considered the written response submitted by you on June 20, 1978. Since you have not indicated that you wish to make an oral presentation, the material contained in your written response and in the notice of proposed removal dated May 31, 1978, are the basis for my decision. I find that the charges contained in the proposal are sustained by the evidence. It is my decision to remove you form your position of Computer Specialist GS-334-12 effective July 1, 1978.

You may appeal this decision to the U.S. Civil Service Commission. The appeal should be sent to: .....etc.

signed George Roybal,
Regional Administrator

QUOTES FROM REVIS v. LAIRD REFERENCED BY JUDGE AS REASON FOR "HYBRID REVIEW" OVER REQUIRED DE NOVO TRIAL.

Middle of first col.,page 983 of courts' cite states:

"appellant had received a fair and full opportunity to present his claim at the administrative level"

Note 1 page 983 of courts cite is:

"1. Appellant also urged causes of action under 42 U.S.C. 1983, 1985, the First and Fifth Amendments, federal common law, and Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct 1999, 29 LEd.2d 619 (1971). Last **appellant sought review under the ADMINISTRATIVE PROCEDURE ACT. 5 U.S.C. 701 et seq.** The district court dismissed the section 1983 cause of action, but permitted suit on all other causes of action, Revis v. Laird, 391 F.Supp. at 1137-39. Our holding on appellants section 1981 cause of action applies to the remaining theories of recovery, and makes unnecessary resolution of the collateral issues presented by them."

QUOTES FROM BOWERS v. CAMPBELL REFERENCED BY JUDGE AS REASON FOR "HYBRID REVIEW" OVER REQUIRED DE NOVO TRIAL

1st col. page 1156 states:

"The United States District Court for northern District of California, Oliver J. Carter, Chief Judge, entered partial summary judgment for defendant and plaintiff appealed. The Court of Appeals, Hufstedler, Circuit Judge, held that employee properly invoked statute giving district court original jurisdiction of civil rights actions and that since employee had exhausted her remedy under Administrative Procedure Act, court must consider agency determination in light of procedural fairness and adequacy of record bearing upon discrimination issue and, if record were found wanting, court could disregard administrative determination, but if court found that agency reached sound conclusion in proceedings which provided claimant fair opportunity to present grievances, court should accord it deference appropriate and both employee and employer should have right to adduce additional evidence."

QUOTES FROM

TITLE 5 Chapter 77 7701
(Civil Service Appellate Procedures)

(c)(1) "Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only the agency's decision" -

(A) "in the case of an action based unacceptable performance described in 4303[1] of this title 1," (must be) "supported by substantial evidence",...

(B) "in any other case," (must be) "supported by **preponderance of the evidence.**"

(c)(2) "Notwithstanding paragraph (1), the **agency's decision may not be sustained** under subsection (b) of this section if the employee (or applicant for employment)

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows the decision was not in accordance with law."

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[1] 4303 requires the "critical elements of an employees position" needed "in each issue of unacceptable performance" be identified to the unacceptable performance. NOT DONE WITH THIS PETITIONERS CASE!

QUOTES FROM

HUD regulation 752.1 & .2
(same as CSC & CFR 5 752.104 & .202)

752.1 (a) "(1) Unless the adverse action is for such cause as will promote the efficiency of the service, **the law forbids** accomplishing the proposal." (i.e., removal)"

752.2, 16 a.(4)(page 19) "reasonable time to answer.....Both personally & in writing as well as.....a reasonable amount of **official time** if he is in duty status."

752.2, 16 a.(3) (page 13) Shall provide employee all "material... relied on.... includes .. .. documents...." in making removal decision.

752.2 15& "16.NOTICE OF PROPOSED ADVERSE ACTION."
a.(6) "A decision on the proposal. The decision must be made by a higher level HUD official, when that exists, than the official who proposed the action. (NOTE: Underscoring supplied.)"

"19. EMPLOYEE'S ANSWER."

a.(1) "An employee is entitled to reasonable time to answer a notice of proposed adverse action personally, or

in writing, or **both personally and in writing.** He is also entitled to furnish affidavits in support of his answer. If he answers, his answer is to be considered by HUD in reaching its decision."

752.2 19(a)(4)(page 19) "Representative (s) ... to hear the" (employees) "answer shall be persons who have authority ... to make a final decision..."

"20. DECISION AND NOTICE OF DECISION.
a. Summary of CSC Regulation (Sec.752.202(b) and (f): The official making the decision considers the employee's answer, if any, in reaching a decision."
b. (1) "Prior to the close of business of the tenth day following the date of receipt of a the employee's answer or, if he did not answer, following expiration of the period within which he was given the opportunity to answer, the official making the decision (paragraph 15) shall have:"

"(a) In his discretion, applied the provisions of paragraph 13 to an IMPARTIAL REVIEW;

(b) CONSIDERED THE EMPLOYEE'S ANSWER, if any;"

QUOTES FROM

Code of Federal Regulations (CFR)

Title 5 772.308

"(a) The appeals Authority shall close the record in any case AFTER the parties to the appeal have had a FULL OPPORTUNITY TO PRESENT ANY AND ALL RELEVANT AND MATERIAL EVIDENCE."

Federal Personnel Manual-FPM Sup 752-1

Civil Service Adverse Actions

Sec.S3-2b(3) "(3)Personal animosity. In Knotts v. U.S." "the court said:"In this case *** we have reluctantly come to the conclusion that plaintiffs superiors in discharging her were motivated, not by the good of the service, but by personal animus."

(1) "If an agency hires an applicant with full knowledge of certain facts concerning his fitness, it may not properly propose adverse action against the employee on the basis of those same facts at a later date if there is no change in circumstances. The agency would not have a cause for adverse action within the meaning of the regulations."

QUOTES FROM THE VERBATIM RECORD MADE

OF THE ADMINISTRATIVE HEARING

Page 213, Dr. Allards closing statement.

"even though administrative expediency requires its closing. Rulings have been made by the presiding officer, who we thank on the record for his generally overall fair attitude, but **RULINGS THAT WE CANNOT ACCEPT, RULINGS AS TO DENIAL OF WITNESSES WHO WE THINK TO BE PERTINENT, STILL, TO THIS MATTER, AND THE MATERIALS WHICH WE THINK ARE NOT REPETITIVE THAT SHOULD HAVE BEEN INCLUDED IN THE RECORD, AND WE REGRET THE LACK OF OPPORTUNITY TO GET THEM IN THE RECORD** AT THIS TIME. But we state for the record that we feel it is incomplete and that these other MATTERS WHICH WE TRIED TO INTRODUCE AND THESE OTHER WITNESSES WHICH WE SOUGHT TO CALL SHOULD HAVE BEEN PERMITTED TO BE PART OF THE RECORD, and let that stand in our concluding remarks as a criticism of the proceedings,"

QUOTES FROM DR. ALLARDS AFFIDAVIT

"During the course of the hearing, Appeals Officer Strand constantly went off the record for argument and rulings to be made of:

A.) content of counsel, witness testimony,

B.) argument of counsel,

C.) discussions of relevancy of documents. Strand also narrowly limited the scope of the hearing to only the proof or rebuttal of the specifications charged by H.U.D. allowing no evidence or testimony on bias and collusion..... He limited the scope of the examination of Jones, a major adverse witness, Strand directed the appellant's line of questioning" "Strand would make an attempt to explain the gist of the off-the-record discussions, however, these rarely related the full content of the discussions."

IGNORING APPELLANTS SUBMISSIONS LEAD COURT TO A DECISION BASED ON ERRONEOUS AUTHORITY

Reference Appendix A_2, page 6 Appellate Court accepted cites of precedence as they were conclusions Respondant wanted. While they addressed the ability to maintain a suit on violations of first & fifth Amendment rights, THE DECISIONS WERE BASED ON ISSUES FOREIGN TO THIS CASE! and again, these cites are based on COURT DENIED Title 5 law and Plaintiff procedural errors not common with this case.

First cites decision was based on fact Plaintiff had not exhausted all available administrative remedies before filing suit, & therefore could not sustain suit for violations of

those rights; DEFINITELY NOT THE CASE HERE. Second cites' decision turned on issue the secretary of the Navy was not notified within the prescribed time. AGAIN, NOT AN ISSUE IN THIS CASE, AS HUD PROCEDURES AUTOMATICALLY TOOK CARE OF THOSE NOTICES GETTING TO THE PROPER PLACE; PLUS, PETITIONER HAD PERSONALLY NOTIFIED THE SECRETARY OF HUD, & HAD ASK THAT SHE BE A WITNESS FOR HIM. She was one of the 52 witnesses listed in 1978 (denied by CSC then and later by District Court).

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1990

No._____

Harold G. Royce PETITIONER
v.
David W. Peyton, Acting Regional Administrator, Region X; Vincent J. Hearing, Deputy Assistant Secretary; William A. Medina, Assistant Secretary for Administration; George Roybal, Regional Administrator for Region X; Peter Carragher, Regional Administrator for Region X; Charles Jones, Director of Management, Budget, Information Region X; Department of Housing & Urban Development, RESPONDENT

PROOF OF SERVICE

I H.G. Royce, do swear or declare that on this date, 7/16/ 1990, pursuant to Supreme Court Rules 29.3 and 29.43, I have served the attached PETITION FOR WRITS OF MANDAMUS on each party to the above proceeding, or that party's counsel, and every other person required to be served by depositing an envelope containing the above documents in the United States Mail properly addressed with first-class postage pre-paid.

The above are served through their Atty. Matthew M Collette, also Solicitor General, at the U.S. Dept of Justice, Washington D.C. 20530.

H.G.Royce (Affiant)

Subscribed & sworn to 16th of July, 1990.
Notary Public in & for County & State.